

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM KIBNER,

Defendant-Appellant.

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UNPUBLISHED

June 17, 1997

No. 191483

Oakland Circuit Court

LC No. 93-122664-FH

Before: MacKenzie, P.J., and Neff and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of leaving the scene of a serious personal injury accident, MCL 257.617; MSA 9.2317, and negligent homicide, MCL 750.324; MSA 28.556. Defendant was sentenced to concurrent terms of one to five years' imprisonment for leaving the scene of a serious personal injury accident and one to five years' imprisonment for negligent homicide. Defendant now appeals as of right. We affirm.

First, defendant contends that the trial court committed reversible error in denying his motion for a directed verdict. Specifically, defendant argues for the first time on appeal that the trial court erred in admitting evidence regarding his identification during a pre-custody photographic lineup and the identification of his truck as the one involved in the accident. Because these issues were first raised on appeal, this Court does not need to address them. *Booth Newspapers, Inc v University of Michigan Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993); *Alford v Pollution Control Inds*, \_\_\_ Mich App \_\_\_ (Docket No. 187522, issued 4/11/97) slip op p 4; Notably, however, it appears from the record that defendant was not in custody at the time of the photographic lineup. Therefore, his right to counsel did not attach. *People v McKenzie*, 205 Mich App 466, 472; 517 NW2d 791 (1994). Regardless, court-appointed counsel was present at the time and defendant does not raise any specific infirmities with the array. Accordingly, allowing evidence of the identifications was appropriate.

Defendant argued in his motion for directed verdict and argues on appeal that the trial court improperly admitted evidence regarding the identification of defendant during the preliminary examination. Because there was no impropriety in the identification of defendant during the

photographic lineup, however, there was no need to establish an independent basis for

defendant's identification during the preliminary examination. *People v Syakovich*, 182 Mich App 85, 89; 452 NW2d 211 (1989). Defendant's concerns regarding the reliability of the his identification during the preliminary examination go to the credibility of the identification which was for the jury's determination. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992); *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996).

Viewed in a light most favorable to the prosecution, sufficient evidence was presented from which a reasonable trier of fact could find that defendant was the driver of the truck responsible for the accident that resulted in the victim's death. One witness identified defendant as the driver of the tow truck, and the trailer that detached from the truck and caused the accident was registered to defendant's construction company. Contrary to defendant's contention, we find this evidence sufficient to support a conclusion that defendant's truck was involved in the accident and that defendant was driving the truck at that time. Accordingly, the trial court properly denied defendant's motion for a directed verdict.

Next, defendant argues that he was denied a fair and impartial trial due to several instances of prosecutorial misconduct, only one of which was objected to during trial. Consideration of unpreserved challenges to alleged instances of misconduct is precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Upon review of the record, we conclude that the challenged questions by the prosecutor were proper.

Defendant did, however, preserve his objection to the prosecution's use of the notice of alibi. Defendant had listed three alibi witnesses on his notices of alibi. Two of the witnesses testified that defendant was in New Hudson, Michigan, at the time a trailer detached from the truck towing it and collided with the victim's truck. Jason Dean Grey was the third witness listed on the notice of alibi. During cross-examination of Grey, the prosecution introduced the notice of alibi and asked Grey whether he was aware of it. Grey eventually conceded that he was in Alabama on the day of the accident. Defendant argues on appeal that the trial court should not have allowed the prosecutor to use defendant's notice of alibi against him.

This Court in *People v Malone*, 180 Mich App 347, 353-354; 447 NW2d 157 (1989), held that a notice of alibi was a party-opponent admission under MRE 801(D)(2)(C) and that it could be used to impeach the defendant's alibi defense. Moreover, once a defendant presents an alibi defense, the prosecution is permitted to comment on the weakness of the alibi defense by commenting on the defendant's failure to produce the alibi witnesses listed in the notice of alibi. *People v Holland*, 179 Mich App 184, 191; 445 NW2d 206 (1989). The notice of alibi was relevant to the credibility of defendant's alibi defense. Two witnesses listed on the notice of alibi did testify that defendant was with them at the time of the accident. Although Gray was also listed on the notice of alibi, he testified that he was in Alabama and not with defendant at the time of the accident. The trial court did not abuse its discretion in allowing the prosecutor to impeach defendant's alibi witness with the party admission, i.e., the notice of alibi. This is true even though the notice of alibi was inconsistent with that witness's testimony because it was not wholly inconsistent with the defense theory. *Malone, supra* at 354. Therefore, we find that the introduction of the notice of alibi was not inappropriate.

Finally, defendant argues that he was denied effective assistance of counsel. We disagree. Defendant first argues that his trial attorney's failure to retain an accident reconstruction expert to analyze the physical evidence denied him a fair trial. The decision whether to call a witness is a matter of sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Generally, this Court will not second-guess matters of a defense attorney's sound trial strategy. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). In order to overcome the presumption of sound trial strategy, defendant must show that his counsel's failure to call an expert deprived him of a substantial defense that would have affected the outcome of the proceedings. *Daniel, supra* at 58. Defendant did not lose a defense that would have affected the outcome of the trial. Rather, the desired testimony was provided by the prosecution's accident reconstructionist. Therefore, we find that it was not unreasonable for defense counsel to forgo the use of a separate accident reconstructionist.

Next, defendant argues that his trial counsel's failure to introduce the police report amounted to ineffective assistance of counsel. We disagree. Because defendant did not provide this Court with a copy of the police report, we are unable to determine how the police report would have assisted defendant in his defense. Moreover, police reports are generally inadmissible. See *Derrick v Blazers*, 355 Mich 176, 180-182; 93 NW2d 909 (1959); *People v Stacy*, 193 Mich App 19, 32-33; 484 NW2d 675 (1992); MRE 803(8)(B).

Affirmed.

/s/ Barbara B. MacKenzie  
/s/ Janet T. Neff  
/s/ Jane E. Markey